IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
CIVIL COURT DEPARTMENT

JOHN DOE, *Plaintiff,*	)	
vs.	)	Case No. 12 CV 168 Div. No. 6
KIRK THOMPSON, DIRECTOR, *et al.*, *Defendants.*	)	

DEFENDANTS' JOINT MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

COME NOW Kirk Thompson, Director of the Kansas Bureau of Investigation, and Frank Denning, Sheriff of Johnson County, Kansas, pursuant to K.S.A. §60-256 and Sup. Ct. Rule 141, and set forth the following facts and argument in support of their motion for summary judgment.

I. Nature of the Case

Plaintiff was convicted of indecent liberties with a child/touching in violation of K.S.A. §21-3503(a)(1) on February 19, 2003. Due to this conviction, Plaintiff has been required to register as an offender pursuant to the Kansas Offender Registration Act ("KORA"). Under the provisions of KORA in effect as of the date of his conviction, Plaintiff's registration obligation was to have terminated on February 19, 2013. The Kansas Legislature amended KORA in 2011. As a result of one of the amendments, Plaintiff's registration obligation will now terminate on February 19, 2028, assuming no periods of incarceration or noncompliance.

Plaintiff seeks declaratory relief holding that the increased registration period set forth in K.S.A. §22-4906, and the public availability of certain of his registry information for

an additional 15 years is contrary to Kansas law and violates the *Ex Post Facto* Clause of the United States Constitution (*Petition for Declaratory Judgment* ("*Petition*"), ¶¶ 20-26). Alternatively, Plaintiff seeks a declaration that as applied to him, the increased registration period and public availability aspects of KORA should not be retroactive, and his continuing obligations under KORA should be limited to those provisions that were in effect as of the date of his conviction, i.e., 2003. *Id.* at ¶ 27.

Defendants seek summary judgment in their favor where there are no uncontroverted material facts and where Plaintiff's claims fail as a matter of law.

II. Uncontroverted Material Facts[1]

1. KORA was originally enacted by the Kansas Legislature in 1993. It was known as the Habitual Sex Offender Registration Act ("HSORA"), and applied to twice-convicted sex offenders. (1993 Kan. Sess. Laws, ch. 253, §17, *et seq.*)

2. KORA was changed in 1994 to require, *inter alia*, first-time sex offenders to register. It was known as the Kansas Sex Offender Registration Act ("KSORA") and became effective April 14, 1994. (1994 Kan. Sess. Laws, ch. 107, § 1)

3. The Kansas Supreme Court decided *State v. Myers* on August 23, 2006. *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997) (KSORA registration requirements held remedial and not a violation of the federal *Ex Post Facto* Clause; notification requirements as applied to Myers—and offenders convicted of offenses which occurred prior to April 14, 1994—violated *Ex Post Facto* Clause).

[1] For reference, prior versions of relevant statutes have been included as exhibits.

4. The Kansas Legislature amended KORA in 1997, requiring registration for certain violent offenses. The act was then known as the Kansas Offender Registration Act. (1997 Kan. Sess. Laws, ch. 181, § 7, *et seq.*, effective May 29, 1997; K.S.A. 22-4901)

5. The Tenth Circuit Court of Appeals issued its decision in *Femedeer v. Haun* on August 28, 2000. *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000) (Utah sex offender registration and Internet notification requirements and stated retroactivity did not violate *Ex Post Facto* Clause).

6. Plaintiff committed his offenses on December 24, 2001 and again on April 2, 2002. (Exh. A, April 3, 2003, *Kansas Sentencing Guidelines Journal Entry of Judgment* [redacted] p.1, Case No. 02CR3266; Exh. B, *Amended Complaint* [redacted], Case No. 02CR3266)

7. On February 19, 2003, Plaintiff was convicted in the District Court of Johnson County, Kansas of indecent liberties with a child 14 years of age or older, but less than 16, as set forth at K.S.A. §21-3503(a)(1), a Level 5 person felony. (Exh. A; Exh. C, *K.S.A. §21-3503* (1995); *Petition*, ¶¶ 1, 2)

8. On the date of his offenses Plaintiff was 38 years of age, and his victim was 14 years of age. (Exh. D-1, *Kansas Standard Offense Report* [redacted], pp. 1, 2)

9. After having taken indecent liberties with his victim for the second time, Plaintiff's reported to the investigating officer a prior incident in "1984 or 1985" where he fondled the breast of a 14-year old girl, and that "the incident was almost exactly like the fondling incident with [the victim in his crime of conviction]." (Exh. D-1, p. 4).

10. On March 5, 2003, the United States Supreme Court rendered its *Smith v. Doe* decision. *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (Alaska Sex

Offender Registration Act was nonpunitive; retroactive application did not violate *Ex Post Facto* Clause).

11. Plaintiff was sentenced on April 3, 2003, to 32 months in prison, granted 36 months standard probation to Community Corrections, and 24 months of post-release supervision. The court determined Plaintiff's crime was sexually motivated. (Exh. A)

12. Plaintiff's crime(s) of conviction, K.S.A. §21-3503, was statutorily classified a "sexually violent crime" by K.S.A. §22-4902(c)(2). (Exh. E, *K.S.A. §22-4902 (Supp. 2002),* p. 503) As a result, Plaintiff was statutorily classified a sex offender, as the term was defined at K.S.A. §22-4902(b). *Id.*

13. Pursuant to the terms of KORA, Plaintiff was required to register as an adult offender. Plaintiff registered through the office of the Sheriff of Johnson County, Kansas, on April 22, 2003. (Exh. F-1, *2003 Kansas Offender Registration Form* [redacted])

14. Pursuant to K.S.A. §22-4907, Plaintiff was required to provide certain registration information to the Sheriff of Johnson County, Kansas. (*Id.*; Exh. G, *K.S.A. §22-4907 (Supp. 2002)*, p. 508) At the time of registration and as required by statute, Plaintiff was also photographed, provided fingerprints and provided a DNA sample. (Exh. G)

15. Pursuant to K.S.A. §22-4906(a), Plaintiff was required to register, and to provide this registration information, for a period of 10 years from the date of conviction, that is, until February 19, 2013. (Exh. H, *K.S.A. §22-4906 (Supp. 2002)* p. 507)

16. The Kansas Court of Appeals issued its decision in *State v. Reider* on April 24, 2003. *State v. Reider*, 31 Kan. App. 2d 509, 67 P.3d 161 (2003) (district court has no discretion to lower 10 year registration period).

17. The Kansas Court of Appeals issued its decision in *State v. Evans* on

November 12, 2010. *State v. Evans*, 44 Kan. App. 2d 945, 242 P.3d 220 (2010) (person convicted of KORA offense required to register for life regardless of whether crime occurred before effective date of amendment changing registration term).

18. The Kansas Legislature amended KORA in 2011, effective July 1, 2011. (Exh. I, 2011 Kan. Sess. Laws, ch. 95, § 2, *et seq.*)

19. Included in the 2011 amendments was a change in terms for which certain classes of offenses offenders are required to register. K.S.A. §22-4906 now requires Plaintiff to register for an additional 15 years, until February 19, 2028. (Exh. J, *K.S.A. §22-4906(b)(1)(E) (Supp. 2011)*, p. 529)

20. In the personal experience of Johnson County Sheriff Office Detective Rebecca Crabtree, at least 80% or more of the time, in cases involving more severe or offensive sex-related offenses, where there is substantial evidence of a criminal offense, there has been a prior arrest, charge, or conviction for sex-related crime. (Exh. K, *Detective Crabtree Affidavit*)

III. Argument and Authority

A. Standards for Summary Judgment

The manifest purpose of a summary judgment proceeding is to obviate delay where there is no real issue of fact. *Kinney v. State* 238 Kan. 375, 383, 710 P.2d 1290, 1297 (1985). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419, 423 (2009).

B. K.S.A. §22-4908 Specifically Prohibits Plaintiff's Request

Plaintiff seeks a court order relieving him of registration obligations beyond the 10-year term in effect on the date of his conviction, based on the version of K.S.A. §22-4906 in effect on April 19, 2003. The Court should grant Defendants judgment as a matter of law where K.S.A. §22-4908 specifically prohibits the instant action. K.S.A. §22-4908[2] provides:

> **22-4908. Person required to register shall not be relieved of further registration.** No person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act.

The statute removes the power of any court to relieve a covered offender of the duty to register when required by KORA. *Kan. Atty. Gen. Op. No. 03-20*, 2003 WL 22074264. The text of 22-4908 is clear, concise and unambiguous on its face. The Court must presume that the legislature has affected its intent through the expressed language of the statute as enacted. *Padron v. Lopez*, 289 Kan. 1089, 1097, 220 P.3d 345 (2009). Where the statutory language presents a clear and unambiguous meaning, the Court must give effect to the legislative intent as expressed in the plain language of the statute as is, without resorting to rules of construction or legislative history. *Double M Constr. v. Kansas Corp. Comm'n*, 288 Kan. 268, 271-72, 202 P.3d 7 (2009). In fact, the Kansas Supreme Court has recently emphasized a court's duty to apply statutes based upon their plain and unambiguous language. *See e.g., State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010). In *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 610, 214 P.3d 676 (2009), the Supreme Court overruled 15 years of appellate precedent (namely, *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997), and *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995)), because they were decided contrary to the principle that

[2] Although the current version of K.S.A. §22-4908 was enacted in 2001 (2001 Kan. Sess. Laws, Ch. 208, §15), it is well settled that KORA registration requirements do not impose punishment; thus amendments thereto are retroactive. *State v. Evans*, 44 Kan. App. 2d 945, 948, 242 P.3d 220 (2010) (citing *State v. Myers*, 260 Kan. 669, 696, 923 P.2d 1024 (1996), *cert denied* 521 U.S. 1118, 117 S. Ct. 2508 (1997)).

an appellate court must give effect only to express statutory language, rather than speculating what the law should or should not be.

In the present case, the plain language of K.S.A. 22-4908 is clear and unambiguous. It statutorily confirms judicial precedent that courts have no power to judicially relieve any offender of the statutory duty to register. Such a limitation is well within the province of the legislature. *See e.g., Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P.2d 143, 146 (Okl. 1977) (Legislature may modify or abolish a common law tort action); *Rosenberg v. Town of North Bergen*, 293 A.2d 662, 667 (N.J. 1972) (Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed); *Modern Barber Colleges v. California Employ. St. Comm'n*, 31 Cal.2d 720, 727, 192 P.2d 916, 920 (1948) (It has consistently been held, in accordance with the overwhelming majority view, that the Legislature has complete power over the rights involved in civil actions and may either create or abolish particular causes of action). This authority is especially true where, as here, a plaintiff's action is based solely on a statutory enactment.

Even in the absence of the quoted statutory language, case law made it clear our courts have no discretion to relieve an offender of the KORA obligations, or to modify or shorten the registration term. *See State v. Snelling*, 266 Kan. 986, 987-89, 975 P.2d 259 (1999) (trial courts have no discretion under the Act to decide whether to apply the public access provisions for those who committed their crimes after the effective date of the Act); *State v. Reider*, 31 Kan. App. 2d 509, 512, 67 P.3d 161 (2003) ("If the legislature had reserved discretion to reduce registration to only the period of time that a defendant could be placed on probation or during diversion they did not say so in 2001").

Plaintiff seeks relief which is expressly prohibited by statute. Accordingly, this Court

should grant Defendants judgment as a matter of law.

C. Application to the Plaintiff of the Current Version of KORA is Constitutional and Does Not Affect Any "Vested, Substantive Rights"

Plaintiff's Petition makes three demands for declaratory judgment relief, which can be boiled down to one claim under the *Ex Post Facto* Clause of the United States Constitution and an alternative claim referring to "vested, substantive rights." The first two demands rest on assertions that the 2011 amendments to KORA, as applied to Plaintiff, would be contrary to the Kansas Supreme Court's decision in *State v. Myers*, 260 Kan. 669 (1996), and would also violate the *Ex Post Facto* Clause of the United States Constitution. *See Petition* ¶¶ 24-26. These two demands amount to one federal constitutional claim – the only claim at issue in *Myers* was a challenge to the Kansas Sex Offender Registration Act (which subsequently became KORA) based on the *Ex Post Facto* Clause of the United States Constitution. See *Myers*, 260 Kan. at 670-71. Plaintiff also makes an alternative demand for declaratory relief, seeking a judgment that the current version of KORA may not be applied to him because doing so would cause the statute to "operate retroactively" and "interfere with [Plaintiff's] vested, substantive rights." *Petition* ¶ 27. As explained below, Defendants are entitled to judgment, as a matter of law, in favor of Defendants on all of Plaintiff's claims.

1. Application of the Current Version of KORA Does Not Violate the *Ex Post Facto* Clause Because Under Well-Settled Federal and Kansas Precedent, the Registration and Public Notification Provisions of KORA Are Not Punitive

Plaintiff asserts that the current registration and public notification requirements of KORA, when taken together, are punitive and thus under the *Ex Post Facto* Clause may not be applied retroactively. Federal and Kansas precedent foreclose these arguments.

The Court's analysis should begin with the well-settled presumption that enactments

of the Kansas Legislature are constitutionally valid. The constitutionality of legislative enactments is presumed, and all doubts must be resolved "in favor of a statute's validity. [A court] will not declare a statute unconstitutional as applied unless it is clear beyond a reasonable doubt that the statute infringes on constitutionally protected rights." *State v. Cook,* 286 Kan. 766, 768, 187 P.3d 1283, 1286 (2008). *See also, State v. Chamberlain*, 280 Kan. 241, 246, 120 P.3d 319, 324 (2005) ("In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done").

In *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140 (2003), the United States Supreme Court considered for the first time a claim that a sex offender registration and notification law violated the *Ex Post Facto* Clause. *See id.* at 92. The Court explained the framework for analyzing this type of constitutional challenge. First, a court must determine whether the legislature meant to establish a civil regime. If so, then a court must "further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id.* (internal quotation marks omitted, alteration in original). "[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (internal quotation marks omitted). *Accord Myers*, 260 Kan. at 677-78, 681 (explaining *ex post facto* analysis requires examination of legislation's purpose and effect). When examining the legislation's effects, the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), are "'useful guideposts.'" *Smith*, 538 U.S. at 97 (quoting *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997)). However, the factors are "'neither exhaustive nor dispositive.'" *Id.* (quoting *United States v.*

Ward, 448 U.S. 242, 249, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980)). The five factors of particular relevance in analyzing the legislation's effects are whether an offender registration and public notification regime: "[1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Id.* Applying these factors here, both the registration and public notification aspects of the current version of KORA pass constitutional muster.

a. *Myers* has already rejected the argument that registration requirements are punitive, and therefore updated requirements apply to all covered offenders.

In *Myers*, the Kansas Supreme Court considered an *ex post facto* challenge to the precursor to KORA, which was known as the Kansas Sex Offender Registration Act (KSORA). The *Myers* court concluded that "the legislative history suggests a nonpunitive purpose – public safety." 260 Kan. at 681. The *Myers* court then examined the statute to determine whether it had a sufficiently punitive effect "to negate the nonpunitive purpose." *Id.* Ultimately, the court held that "KSORA's registration requirement does not impose punishment; thus, our ex post facto inquiry as to registration ends." *Id.* at 695. This holding applies with equal force to the current version of KORA.

Eventually, the Legislature expanded the registration requirement to include other types of offenders, and the act became known as KORA. *See* 1997 Kan. Sess. Laws, ch. 181, §8. Subsequent amendments have refined the requirements further, and, in 2010, the Kansas Court of Appeals held that the registration requirement remains nonpunitive. In *State v. Evans*, 44 Kan. App. 2d 945, 948, 242 P.3d 220, 223 (2010), an offender that was originally subject to a ten-year registration period at the time of his conviction challenged the then-

current version of KORA, which imposed a lifetime registration requirement on the offender. The court applied *Myers* and held that the amendments were retroactive and not punitive, and therefore the offender would now have to satisfy the lifetime registration requirement. The court stated:

> In [*Myers*] our Supreme Court held the KORA "registration requirement does not impose punishment; thus, our ex post facto inquiry as to registration ends." . . . Because the registration requirement is not punishment and does not violate the Ex Post Facto Clause of the Constitution, any person who has been convicted of any of the offenses listed in K.S.A. 22–4906(d) is now required to register for that person's lifetime regardless of whether the crime occurred before the legislature amended the KORA. *Id.* (quoting *Myers*, 260 Kan. at 695).

The *Myers* and *Evans* decisions are directly on point. Under this precedent, Plaintiff's *ex post facto* challenge to the registration requirements fails as a matter of law.

b. The United States Supreme Court's 2003 Decision in *Smith v. Doe* Forecloses All of Plaintiff's *Ex Post Facto* Claims.

After *Myers* was decided in 1996, the United States Supreme Court decided *Smith v. Doe*, 538 U.S. 84 (2003), rejecting an *ex post facto* challenge to Alaska's Sex Offender Registration Act. The registration requirements in the Alaska statute at issue in *Smith* closely resemble those in the current version of KORA. In particular, the Alaska statute requires a released sex offender to: register 30 days prior to release from prison, or within a working day of conviction or entering the state; provide name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and postconviction treatment history; permit authorities to photograph and fingerprint; provide annual verification of registration information for 15 years if convicted of a single, non-aggravated sex crime, or provide quarterly verification for life if convicted of an aggravated sex crime or two or more sex

crimes; and notify local police if he moves. *See id.* at 90 (citing Alaska Stat. §§ 12.63.010, 12.63.020). An offender who knowingly fails to comply with the Alaska act is subject to criminal prosecution. *See id.* (citing Alaska Stat. § 11.56.835, 11.56.840). The Alaska Department of Public Safety maintains the central registry of sex offenders, and makes the following information available to the public: "the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements ... or cannot be located." *Id.* at 91 (citing Alaska Stat. § 18.65.087(b)) (alterations in original). Alaska makes most of the non-confidential information available on the Internet. *Id.*

The Supreme Court first examined the legislative purpose and concluded that the Alaska legislature intended to create a civil, nonpunitive regime. *Id.* at 96. Alaska's codification of portions of the legislation in the criminal procedure code was insufficient to show the legislative intent was punitive. *Id.* at 95. Rejecting a formalistic approach, the Court noted that Alaska's criminal procedure code contained civil procedures as well. *Id.* (citing procedures for disposing of seized property). And while the registration program is effectuated, in part, through procedures related to an offender's conviction – such as informing offenders at the time of conviction about the registration requirements and consequences for failing to register – that aspect does not transform the regime into a punitive one. "Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." *Id.* at 96.

Turning to the effects of the Alaska act, the Court examined the five most relevant *Mendoza-Martinez* factors and concluded that the effects of the legislation did not negate Alaska's intention to create a civil regulatory program. First, the Court rejected the argument that registration and public notification resembled the historical shaming punishments of the colonial period. Whatever the stigma experienced by an offender, it results not from being physically displayed for ridicule, but from "the dissemination of accurate information about a criminal record, most of which is already public." *Id.* at 98. In the American criminal justice system, indictment, trial, and sentencing all occur publicly, and "[t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Id.* at 99. While publicity may cause negative consequences for the convicted offender, this publicity is not the primary objective of this type of regulatory program. *See id.* And the Court concluded that the purpose and effect of Internet availability of registration information was "to inform the public for its own safety, not to humiliate the offender." Indeed, "[w]idespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Id.* Internet access is akin to visiting a records archive and makes document searches "more efficient, cost effective, and convenient" for the public. *Id.*

Second, the Alaska act imposed no physical restraint on offenders, and any negative consequences regarding employment or residence flow from the fact of conviction, which is already a matter of public record. *See id.* at 100-101. Third, regarding the traditional aims of punishment, the Alaska act was not punitive simply because its provisions may help deter future offenses or because it contains varying registration periods based on the type of offense committed. Effective regulation routinely assists in deterrence, and the mere presence

of that purpose does not render a program criminal. *See id.* at 102. And categorizing reporting periods based on offense type is "reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Id.*

The Court found the fourth factor – a rational connection to a nonpunitive purpose – to be the most significant factor in determining the legislation's effects were not punitive. *Id.* The program alerts the public to the risk of sex offenders in their community, thereby advancing the legitimate nonpunitive purpose of public safety. *See id.* at 102-103. Importantly, there is no requirement for the program to have "a close or perfect fit with the nonpunitive aims" of the statute. *Id.* at *103.*

Finally, the Court examined whether the Alaska act was excessive in relation to its regulatory purpose, and concluded that it was not. The statute was not required to assess a convicted sex offender's future dangerousness and did not need limits on the number of persons with access to the information. The Alaska legislature validly concluded that a sex offense conviction provides evidence of a substantial risk of recidivism. *See id.* at 103-104. The Court noted that it is well-established that:

> The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002); see also *id.*, at 33, 122 S.Ct. 2017 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))).

Id. at 103. On that basis, states are permitted to make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id.*

Nor were the long duration of the reporting requirements and the wide dissemination

of the information considered excessive. "Empirical research on child molesters, for instance, has shown that, '[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release.'" *Id.* at 104 (quoting National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 (1997)). And Alaska's system was a passive one that requires individuals to seek access to the information, while ensuring that the information is accessible throughout the State. The mobility of our population justifies that approach. *See id.* (citing "D. Schram & C. Milloy, Community Notification: A Study of Offender Characteristics and Recidivism 13 (1995) (38% of recidivist sex offenses in the State of Washington took place in jurisdictions other than where the previous offense was committed)").

Accordingly, the Supreme Court determined that Alaska's registration and public notification regime was not punishment, and held that its retroactive application did not violate the *Ex Post Facto* Clause. *See id.* at 105-106.

Tenth Circuit precedent anticipated and is in accord with this result. *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). The *Femedeer* court examined a challenge to Utah's sex offender registration and notification statute, which provided for unrestricted public disclosure of registry information, and applied retroactively to offenders who committed their crimes and completed their sentences prior to the effective date of the enabling legislation. The Circuit Court held that Utah's Internet notification scheme presented neither an *ex post facto* violation nor a double jeopardy violation.

Applying *Smith* to Plaintiff's challenge to retroactive application of the current version of KORA, his constitutional claim fails.

First, it is well-settled that the legislative purpose of KORA is remedial and nonpunitive. *See Myers*, 260 Kan. at 678 ("The State counters the intent of KSORA is regulatory. We agree with the State."); *id.* at 681 ("We conclude that the legislative history suggests a nonpunitive purpose – public safety."); *id.* at 695 ("We hold that KSORA's registration requirement does not impose punishment; thus, our ex post facto inquiry as to registration ends."); *id.* at 698 ("We hold that the legislative aim in the disclosure provision was not to punish and that retribution was not an intended purpose."); *State v Scott*, 265 Kan. 1, 15, 961 P.2d 667 (1998) (holding that due, in part, "to the nonpunitive intent and the concern for public safety in the KSORA" that the public access provisions were not cruel or unusual punishment); *State v. Wilkinson*, 269 Kan. 603, 609, 9 P.3d 1 (2000) ("KSORA's legislative purpose is to protect public safety and, more specifically, to protect the public from sex offenders as a class of criminals who are likely to reoffend."); *id.* at 614 ("[W]e hold that the registration and public access provisions of the Act do not violate procedural due process."); *State v Cook*, 286 Kan. 766, 774, 187 P.3d 1283 (2008) ("[T]his court [has] found that the registration act was intended to promote public safety and to protect the public from sex offenders, who constitute a class of criminals that is likely to reoffend."); *Evans*, 44 Kan. App. 2d at 948 ("Because the registration requirement is not punishment and does not violate the Ex Post Facto Clause of the Constitution, any person who has been convicted of any of the offenses listed in K.S.A. 22-4906(d) is now required to register for that person's lifetime regardless of whether the crime occurred before the legislature amended the KORA. It follows then that any amendments not imposing punishment are also retroactive.").

Next, looking to the effect of current version of KORA, there is nothing significantly different about Kansas' approach to distinguish it from Alaska's, which has been determined

to be nonpunitive. Like the Alaska approach, the Kansas approach is not properly considered analogous to historical shaming punishments. Any stigma that results comes from dissemination of a public criminal record. In Kansas, as elsewhere, an offender's conviction information is public. The Kansas Open Records Act provides that:

> The name; photograph and other identifying information; sentence data; parole eligibility date; custody or supervision level; disciplinary record; supervision violations; conditions of supervision, excluding requirements pertaining to mental health or substance abuse counseling; location of facility where incarcerated or location of parole office maintaining supervision and address of a releasee whose crime was committed after the effective date of this act *shall be subject to disclosure to any person other than another inmate or releasee*, except that the disclosure of the location of an inmate transferred to another state pursuant to the interstate corrections compact shall be at the discretion of the secretary of corrections; . . . .

K.S.A. 45-221(29)(A) (emphasis added). The Kansas approach also uses a passive notification system, requiring individuals to access the information, and provides no wider dissemination than Alaska's constitutionally sufficient regime. *See State v. Wilkinson*, 269 Kan. 603, 613, 9 P.3d 1 (2000) ("The Kansas public access provisions are more passive in nature because the Kansas act permits members of the public to request information, rather than actively requiring public notification.").

Regarding any affirmative restraint or disability, once again, the stigma and consequences flowing from an offender's crime cannot be imputed to the offender registration program. The Kansas program does differ from Alaska's by requiring an offender to report in person to local law enforcement. However, this additional requirement does not tip the scales in Plaintiff's favor. Reporting in person furthers the important regulatory purpose of the offender registration program. The program's public safety objectives depend on accurate information, and in-person reporting ensures that local law

enforcement can verify an offender's current physical appearance and presence in the locality's jurisdiction.

On the remaining three *Mendoza-Martinez* factors, the similarities between the Kansas and Alaska offender registration regimes readily validate the same determinations being made for the constitutionality of the Kansas act. On the relationship to the traditional aims of punishment, Kansas' approach contains nothing to make it distinguishably retributive from Alaska's. Kansas' varying categories of reporting periods are "reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Smith*, 538 U.S. at 102. Defendants are compelled to respectfully point out that the danger of recidivism addressed by the statute is very real. Aside from Plaintiff's fondling of his 14-year-old victim on December 24, 2001 and again April 2, 2002 (Exh. A, *Journal Entry of Judgment*), Plaintiff admitted to the investigating officer of an incident "almost exactly like" those incidents with another 14-year-old victim in "1984 or 1985." (Exh. D-1, *Offense Report*, p. 4). *See also*, Exh. K, *Detective Crabtree Affidavit* (at least 80% of more of the time in significant cases involving sex-related offenses, there has been a prior arrest, charge or conviction for a sex related crime). In addition, the program undeniably has a rational connection to "alerting the public to the risk of sex offenders in their communit[y]," and is not excessive because it makes "reasonable categorical judgments that specified crimes should entail particular regulatory consequences." *Smith*, 538 U.S. at 103 (internal quotation marks omitted, alteration in original).

c. The holding of *Myers* that the public notification provisions have punitive effect – based on unlimited public access and the absence of any individualized determination of dangerousness – has been superseded by the United States Supreme Court's holding in *Smith*.

To be sure, the Kansas Supreme Court in *Myers* concluded that the public notification provisions of KSORA amounted to punishment because of the unrestricted public access and the absence of an individualized determination of dangerousness:

> The disclosure provision allowing public access to sex offender registered information, K.S.A. 22-4909, when applied to Myers, is unconstitutional punishment under the Ex Post Facto Clause. The unlimited public accessibility to the registered information and the lack of any initial individualized determination of the appropriateness and scope of disclosure is excessive, giving the law a punitive effect–notwithstanding its purpose, shown in the legislative history, to protect the public. *Myers*, 260 Kan. at 700-701.[3]

However, the United States Supreme Court in *Smith* subsequently rejected all of the reasoning that led to the *Myers* result.

As an interpretation by the United States Supreme Court of the *Ex Post Facto* Clause of the United States Constitution, *Smith* is controlling precedent. *See, e.g.*, *Trinkle v. Hand*, 184 Kan. 577, 579, 337 P.2d 665 (1959) ("[T]he interpretation placed on the Constitution and laws of the United States by the decisions of the supreme court of the United States is controlling upon state courts and must be followed. This we may add is true regardless of views of state courts even though such decisions are inconsistent with their prior decisions.").

The *Myers* court stated that the unrestricted public access "leaves open the possibility that the registered offender will be subjected to public stigma and ostracism," "provides a deterrent or retributive effect that goes beyond [the nonpunitive] purpose," and "goes beyond that necessary to promote public safety." *Myers*, 260 Kan. at 695, 698. As noted, the United States Supreme Court subsequently, in *Smith v. Doe*, determined that unlimited public access does none of these things. Regarding stigma, the *Myers* court relied predominantly on a comparison to colonial-era punishments like the badge of punishment in the novel *The*

[3] The *Myers* court made this determination in the context of a discussion of the evaluation of excessiveness, but in the course of its opinion declared "[p]ublic access to sex offender registration is a matter of legislative public policy." 260 Kan. at 699.

Scarlet Letter, as described in an opinion evaluating the New Jersey offender registration statute. *See Myers*, 260 Kan. at 696-97 (citing *Artway v. Attorney General of State of New Jersey*, 81 F.3d 1235, 1265 (3rd Cir. 1996)). The United States Supreme Court concluded that "[a]ny initial resemblance to early punishments is, however, misleading," because, as explained above, humiliation is incidental to the dissemination of accurate information from public criminal records. *Smith*, 538 U.S. at 98, 99. Similarly, as explained above, the Court also concluded that unlimited public access was reasonably related to the nonpunitive objectives of the offender registration regime. *See id.* at 102.

Finally, the Court determined that neither the lack of individualized determinations on disclosure nor the provision of unlimited public access made Alaska's statute go excessively beyond its public safety purpose. Specifically with regard to the question of "excessiveness," the *Smith* Court said the excessiveness inquiry "[i]s not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The Act meets this standard." *Id.* at 105. The Court concluded that a categorical approach to registration satisfied the constitutional requirements.

> The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause.
>
> . . . .
>
> In the context of the regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause. *Id.* at 104.[4]

[4] *See also Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) (decided March 5, 2003, the same day as *Smith v. Doe*; reversing lower court decisions and holding that a sex offender registry, available to the public on an Internet website, did not violate procedural due process where the offender was not entitled to predetermination hearing as to dangerousness before inclusion on the registry).

The "wide dissemination of the information" through the Internet was also not unreasonable. *Id.* at 104. "[F]or Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment." *Id.* at 105.

Indeed, the Kansas Court of Appeals has already recognized that "*Smith*, as controlling authority on interpretation of the United States Constitution, effectively undermines the holding in *Myers* that the disclosure requirements of KORA are punitive for Ex Post Facto purposes." *See In the Matter of E.L.W.*, 270 P.3d 1229, 2012 WL 686861, at *4 (Kan. Ct. App. Feb. 17, 2012).

As a matter of federal law, unlimited public access to offender registration information and the lack of an individualized determination of dangerousness do not render a program punitive and cannot support a holding that KORA violates the *Ex Post Facto* Clause.

Plaintiff's registration requirements may be inconvenient. However, Defendant emphasizes that "it is not for the Court to overrule the legislative determination of the danger posed by sex offenders." *Scott*, 265 Kan. at 10, 961 P.2d at 673. In sum, KORA's registration and public notification provisions continue to serve a remedial, public safety function. Accordingly, KORA does not impose punishment, and retroactive application of the current version of the statute does not violate the *Ex Post Facto* Clause.

2. Updated KORA Requirements Apply to All Offenders Covered By the Statute, and Applying the Current Version of KORA To Plaintiff Does Not Interfere With Any of Plaintiff's "Vested, Substantive Rights"

Plaintiff seeks alternative relief from the current KORA requirements on two related

grounds. First, he asserts that applying the current KORA requirements to him causes the statute to "operate retroactively," and the Legislature did not express a clear intent for that outcome. *Petition* ¶ 27. Second, Plaintiff argues that if the updated requirements apply to him, the new requirements "would interfere with his vested, substantive rights." *Id.* Neither of these arguments have merit.

Even if application of updated registration requirements amounts to retroactive application, the Legislature expressed a clear intent that all sex offenders convicted after April 14, 1994, are subject to KORA's requirements as they may be changed from time to time.

KORA establishes a general regulatory program that is plainly intended to apply to all offenders that come within its ambit. The statute sets out definitions for each type of offender covered, and "sex offender" is defined to include all offenders convicted of certain crimes after specific dates. As relevant here, a "sex offender" under KORA is "any person who: . . . On or after April 14, 1994, is convicted of any sexually violent crime set forth in subsection (c) . . . ." K.S.A. 22-4902(b)(1). In turn, "sexually violent crime" is defined to include "indecent liberties with a child as defined in K.S.A. 21-3503, prior to its repeal, or subsection (a) of K.S.A. 21-5506, and amendments thereto . . . ." K.S.A. 22-4902(c). The Legislature's choice to specifically include the date "April 14, 1994" as part of the definition of "sex offender" makes clear that the Legislature intended that all sex offenders convicted of covered crimes after that date would be subject to the requirements of KORA, however those requirements might be updated.

Plaintiff was convicted of indecent liberties with a child in February 2003. (Exh. A, *Journal Entry*). Accordingly, there is no doubt that KORA applies to Plaintiff.

Finally, Kansas courts have already rejected Plaintiff's argument that updated registration and notification requirements may not be applied to offenders currently subject to KORA. Sex offenders have long had notice that Kansas requires registration and provides public notification, and modifications to the requirements work no significant change in the law. As the Kansas Supreme Court stated in *Myers*: "Would-be sex offenders have been on notice since April 14, 1994, when KSORA became law, that if they commit certain crimes they will be subject to public disclosure under K.S.A. 22-4909." 260 Kan. at 699. The Kansas Court of Appeals has held that as KORA's registration and public notification requirements are updated, offenders subject to KORA must comply with those current requirements. *See Evans*, 44 Kan. App. 2d at 948; *cf. In re CPW*, 289 Kan. 448, 452 (2009) ("Since 2006, the legislature has increased the number of in-person reporting requirements for registered sex offenders. Currently, any person who is required to register 'shall report in person three times each year to the sheriff's office in which the person resides or is otherwise located.'" (quoting K.S.A. 22–4904(c)). The current requirements of KORA are consistent with the registration and public notification program established at the outset, and the Legislature's amendments continue to further the public safety purpose of the statute. Plaintiff's Petition identifies no particular rights that have been impaired, and, as explained above, Kansas courts have consistently determined that retroactive application of KORA is appropriate. Doing so furthers the important public safety purpose of the statute and is in the public interest. Accordingly, Plaintiff's claims should be denied.

CONCLUSION

The Court should deny Plaintiff's requested relief outright where K.S.A. §22-4908 expressly prohibits the relief he now seeks. Further, as a matter of federal law, neither

KORA's purpose nor its effect is punitive for purposes of a claim under the *Ex Post Facto* Clause. Finally, the Legislature intended to apply KORA to all sex offenders convicted after April 14, 1994, and doing so imposes no unreasonable burdens on Plaintiff. Therefore, Defendants respectfully request that judgment be entered in Defendants' favor and against Plaintiff on all of Plaintiff's claims.

Respectfully Submitted,

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I hereby certify that a true and correct copy of the above and foregoing Memorandum In Support of Motion for Summary Judgment was sent by U.S. mail, postage prepaid, this 9th day of November, 2012 addressed to:

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